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**IN THE
COURT OF APPEALS OF INDIANA**

MILTON JAMES WILSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0511-CR-551

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0307-MR-128

August 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Milton James Wilson appeals his sentence for murder.¹ He raises two issues, which we restate as:

- I. Whether the trial court abused its discretion by identifying and weighing the aggravating and mitigating circumstances;
- II. Whether Wilson's sentence was appropriate in light of the nature of the offense and the character of the offender; and
- III. Whether the trial court abused its discretion by denying a jury request to review testimony.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 10, 2003, Wilson, who was nineteen years old, visited Rod Sinclair's upstairs apartment in Elkhart, Indiana. Present in the apartment were Sinclair and his cousin, Eleanor Boothe. While in the apartment, Wilson drank alcohol, smoked marijuana, and was handling his .45 caliber handgun. When Wilson pointed the gun at Boothe "a couple of times," she asked him to stop, but Wilson continued to wave his gun. *Ex. 72X* at 329-31. Later that evening, Jennifer Studt, her young son, and Danielle Janowski joined the gathering. Wilson continued to wave his gun as he talked. *Id.* at 331. Boothe left shortly after Studt and Janowski arrived.

After Boothe left, Wilson and Janowski began arguing in the kitchen about their past relationship. When Studt and Sinclair entered the kitchen, Janowski told Studt she wanted to leave. Studt agreed that she, too, was ready to go. Studt and Sinclair left the

¹ See IC 35-42-1-1.

kitchen to get Studt's son, who was sleeping in the next room. They then heard Janowski say: "What are you going to do shoot me, Milt? Well, then shoot me." *Ex. 73X* at 402.

Wilson fired one shot, hitting Janowski. Studt and Sinclair returned to the kitchen to find Janowski lying face down and Wilson holding the gun. Studt observed a lot of blood coming from near Janowski's head. *Id.* at 403-04. Wilson said: "I shot her. I shot her, and you didn't see anything." *Id.* at 405.

Wilson put the gun in his pants, grabbed Janowski by the feet, and dragged her, face down, out of the kitchen and down the apartment's outside stairs. Studt and Sinclair heard the banging of Janowski's head hitting the steps. *Id.* at 406-07, *Ex. 74X* at 484. Studt and Sinclair then heard three more gunshots. *Exs. 73X* at 407, *74X* at 486. As Studt left, she saw blood on the steps and could see Janowski's body lying in the corner of the apartment's backyard.

The next morning an acquaintance took Wilson to Gary, Indiana, where Wilson boarded a bus to Louisiana. He was arrested in Louisiana and returned to Indiana, where he was charged with murder. A jury found Wilson guilty. At the sentencing hearing, on July 15, 2004, the trial court imposed a sentence of sixty-two years. The trial judge identified eleven aggravating circumstances that outweighed two mitigating circumstances and supported a seven-year enhancement to the fifty-five year presumptive sentence for murder under IC 35-50-2-3.² *Appellant's App.* at 11-15.

² The Indiana sentencing statutes now provide for "advisory" rather than "presumptive" sentences, and IC 35-50-2-3 has been amended to reflect this change.

Wilson appealed his sentence, and on March 23, 2005, the Court of Appeals found *sua sponte* that, under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the case should be remanded for a jury, and not the judge, to determine the aggravating circumstances. On remand, a jury was convened to find the aggravating circumstances.³ During jury deliberations, the foreman asked the trial court for copies of all transcripts of testimony. The trial court replied that in order to do so, the jury foreman must indicate “a difference of opinion amongst the jurors as to what the testimony of any witness consisted of.” *Appellant’s App.* at 131. When the trial court asked the foreman if there was a difference of opinion, the foreman said no. *Id.* at 132. After the jury resumed deliberations, Wilson’s counsel informed the trial court that he had seen a jury member mouth the word “yes” to the trial court’s question. *Id.* at 133.

The jury returned a verdict, which found nine aggravating circumstances. *Id.* at 7. After finding two additional aggravating circumstances and the two original mitigating circumstances, the trial court imposed a sentence of sixty-two years. *Id.* at 64-66. Wilson now appeals.

³ The Court of Appeals found only one aggravating circumstance proper under a *Blakely* analysis:

[T]he court finds as an aggravating circumstance the fact that this Defendant has been subjected to probation, informal supervision, shoplifting clinic, and other sanctions in Juvenile Court all of which have proved ineffective in causing the Defendant to cease violations of the criminal laws of this state and further indicating that this Defendant needs rehabilitation which can only take place in a penal setting.

Appellant’s App. at 15.

DISCUSSION AND DECISION

I. Whether Wilson was Properly Sentenced

Sentencing decisions are within the trial court's discretion and will be reversed only upon a showing of abuse of that discretion. *Farris v. State*, 787 N.E.2d 979, 983 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. *Ross v. State*, 835 N.E.2d 1090, 1092 (Ind. Ct. App. 2005), *trans. denied*.

In *Blakely v. Washington*, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Our Supreme Court has held that under *Blakely* there are at least four proper ways to enhance a sentence with aggravating circumstances: 1) a prior conviction or juvenile adjudication; 2) a fact found by a jury beyond a reasonable doubt; 3) admissions by the defendant; or 4) during a guilty plea where the defendant has waived *Apprendi* rights and stipulated to facts or consented to judicial fact-finding. *Johnson v. State*, 830 N.E.2d 895, 897 (Ind. 2005) (citing *Trusley v. State*, 829 N.E.2d 923, 925-26 (Ind. 2005)).

At Wilson's re-sentencing hearing, the jury found beyond a reasonable doubt, the following aggravating circumstances:

- 1) That the defendant created a dangerous situation for persons other than the victim, to-wit: a small child being within close proximity to the location of the shooting and two (2) other adult human beings in the next room at the time of the shooting.
- 2) That the defendant consumed marijuana and alcohol prior to the shooting and the defendant was under the age for the legal consumption of alcohol.
- 3) That the defendant was observed to be recklessly handling the handgun prior to the shooting.
- 4) That the defendant pointed the firearm at witness, Eleanor Booth,⁴ prior to the time of the shooting.
- 5) That after shooting the victim in the face, the defendant dragged the victim down a flight of stairs inflicting additional injuries upon her and then shot her in the back and in the thigh and left her body to languish in the yard outside.
- 6) That the defendant tried to influence witnesses Studt and Sinclair to provide false accounts of the shooting to the police.
- 8) That the defendant failed to seek immediate medical attention for the victim after she was first shot.
- 9) That following the first shot, the defendant ultimately shot the victim three (3) additional times with the same firearm while the victim was still alive.
- 10) That the defendant's flight to the State of Louisiana was evidence of the defendant's consciousness of guilt and further that said flight took place to complicate the investigation being conducted by the police.

Appellant's App. at 24-25, 94-95.

The trial court accepted the jury's verdict and also found two other aggravators: First, it found that the defendant had no permit for his handgun through the defendant's

⁴ The transcript indicates the witness's name is spelled Boothe.

admission. *Id.* at 104. Then, it found that the defendant has been subjected to probation, informal supervision, shoplifting clinic, and other sanctions in Juvenile Court all of which have proved ineffective in causing the defendant to cease violations of the criminal laws of this state. *Id.* The trial court also found this aggravator, which this court affirmed at Wilson's original appeal as "a valid aggravator being derivative of [Wilson's] criminal history." *Id.*

Wilson first contends that the State failed to prove to the jury beyond a reasonable doubt the existence of aggravators one, three, four, five, six, eight, nine, and ten. Claims of insufficient evidence for proving sentencing aggravators should be reviewed in the same manner as other sufficiency of evidence claims. *Pinkston v. State*, 836 N.E.2d 453, 464 (Ind. Ct. App. 2005), *trans. denied* (2006). In reviewing sufficiency of evidence claims, we will not reweigh the evidence or access the credibility of witnesses. *Id.* We consider only the evidence most favorable to the jury's conclusion, together with all reasonable and logical inferences that can be drawn therefrom. *Id.* We will affirm a jury's findings if they are supported by substantial evidence of probative value. *Id.*

Wilson specifically contends that aggravator one, that he created a dangerous situation for other persons in the apartment, was not proven because no bullets entered or came near the living room, endangering Studt, her child, or Sinclair. In *Simms v. State*, 791 N.E.2d 225 (Ind. Ct. App. 2003), a man shot his wife as she was getting into her truck parked near her mother's home. The court held that discharging a gun in a residential area is a valid aggravating circumstance because it could have injured or killed innocent bystanders. *Id.* at 234 n.4. Here, the facts showed Wilson was in even closer

proximity to innocent bystanders than was the husband in *Simms*. A reasonable jury could find the existence of this aggravator.

Wilson next contends that aggravator three, his reckless handling of the handgun, was not proven because the court did not give the jury an instruction on the meaning of “reckless.” Appellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection. *Patten v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). By failing to tender a jury instruction defining “reckless” or object to its use at trial, Wilson has waived this issue on appeal.

Additionally, Wilson contends that the jury lacked proof that his actions of waving and pointing his handgun were dangerous or threatening. Under IC 35-47-4-3(b), knowingly pointing even an unloaded gun at another person is a crime. Uncharged misconduct is a valid sentence aggravator. *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). Here, Boothe testified that Wilson repeatedly pointed his gun at her. *Ex. 72X* at 329. In *Nantz v. State*, 740 N.E.2d 1276, 1280 (Ind. Ct. App. 2001), *trans. denied*, this court found that the jury could reasonably believe a witness rather than the defendant who was convicted of pointing a firearm. A reasonable jury could find the existence of this aggravator.

Wilson next contends that the State failed to prove aggravators five, eight, and nine, that he drug the victim down the stairs, failed to seek medical attention, and shot the victim three more times, beyond a reasonable doubt. Wilson specifically contends that neither Studt nor Sinclair saw him drag Janowski down every step, and neither witness

saw him fire additional shots. Further, Wilson argues that the State failed to prove that Janowski was alive when he dragged her down the steps. Because Studt and Sinclair saw Wilson begin to drag Janowski down the steps, heard Janowski's head banging on the steps, and then heard gunshots, a reasonable jury could infer that Wilson dragged Janowski into the backyard and fired those additional shots. Additional testimony supports the jury's finding of these aggravators. Wilson fired the initial shot during a conversation with Janowski, and Studt saw lots of blood coming from near Janowski's head as she lay on the floor. Further, the results of the autopsy showed Janowski was alive when one of the bullets entered her back. *Ex. 75X* at 680. A reasonable jury could infer that Wilson first shot Janowski in the face and that she remained alive after that first shot and for a time after she reached the backyard.

Wilson also contends that aggravator nine, that he shot the victim three additional times, was duplicative of aggravator five, that he drug the victim down the stairs and inflicted additional injuries on her and shot her in the back and thigh. We agree that there is an overlap in the two aggravators. However, the total aggravating weight of an element common to two aggravators would not necessarily increase simply because it is duplicative. *Stevens v. State*, 691 N.E.2d 412, 434 (Ind. 1997), *cert. denied* (1998, 2003). The weighing, rather than the counting, of aggravators reduces the danger of giving overlapping elements too much consideration. *Overstreet v. State*, 783 N.E.2d 1140, 1162 (Ind. 2003), *cert. denied* (2004). The trial court assigned extreme weight to aggravator five, but gave no weight to aggravator nine. *Tr.* at 348-49. Further, the court

found aggravator nine to be “somewhat duplicitous of other aggravators.” *Id.* at 349. The trial court did not abuse its discretion in applying aggravator nine.

Wilson next contends that the State produced insufficient evidence to show he attempted to influence witnesses Studt and Sinclair to provide false accounts of the shooting. After shooting Janowski, Wilson told Studt and Sinclair: “I shot her. I shot her, and you guys didn’t see anything.” *Ex. 73X* at 405. A reasonable jury could infer that, by his statement, Wilson intended to influence both witnesses.

Wilson also contends that the State failed to prove aggravator ten, that his flight was evidence of his consciousness of guilt and complicated the police investigation. At his re-sentencing hearing, the jury heard evidence that, within hours of the murder and after learning that the police suspected him, Wilson traveled to Gary and boarded a bus for Louisiana. *Ex. 76X* at 820-22. This evidence was sufficient to prove this aggravator.

Wilson also contends that although he admitted aggravators two, seven, and eight, his underage alcohol and marijuana consumption, lack of a handgun permit, and failure to seek aid for the woman he shot, the trial court failed to explain how these aggravators related to the murder. Wilson’s illegal use of alcohol and marijuana prior to the crime, his possession of a firearm without a license prior to and during the crime, and his failure to seek medical assistance for the victim after the crime are all circumstances relevant to the crime. The trial court did not abuse its discretion in its treatment of these aggravators.

Wilson finally contends that the trial court should not have found aggravator thirteen, that prior attempts at rehabilitation had failed. Our Supreme Court has found that such statements are legitimate observations about the weight to be given to the

criminal history, but cannot serve as separate aggravating circumstances. *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005). They are, however, a concise description of what the underlying facts demonstrate. *Id.* at 18.

At Wilson's original sentencing hearing, the trial court found two mitigating circumstances:

- 1) The Defendant's age of 20 years which indicates he is still a young man and inexperienced in the ways of the world in some respects.
- 2) The Court further notes as a mitigating circumstance the fact that the Defendant has not accumulated any adult criminal convictions. The Court notes this [is] a substantial mitigating factor as determined by Indiana Law.

Appellant's App. at 11. At his re-sentencing hearing, the court found the same mitigators, but declined to give substantial weight to Wilson's lack of prior adult convictions. *Id.* at 105.

It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). A trial court is not required to give the same weight to mitigating circumstances as does the defendant. *Id.*

Wilson contends that the trial court committed error by failing to give substantial weight to his lack of prior adult convictions. Our Supreme Court has found that the mitigating circumstance of lack of prior criminal history is weighty. *Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004) (citing *Loveless v. State*, 642 N.E.2d 974, 976 (Ind. 1994)) (stating that a lack of delinquent or criminal record deserves substantial mitigating weight). Both cases are distinguishable because, unlike Wilson, who had a prior juvenile

history, the defendants in *Merlington* and *Loveless* had no prior criminal history of any kind. *Merlington*, 814 N.E.2d at 272; *Loveless*, 642 N.E.2d at 976. Further, our Supreme Court has found that when the aggravators outweigh the mitigators, the court is entitled to decline to give considerable weight to the lack of prior criminal history. *Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind. 1998) (citing *Kingery v. State*, 659 N.E.2d 490, 498 (Ind. 1995)). Here, the court found that the aggravators outweighed Wilson's two mitigators. The trial court did not abuse its discretion by declining to give substantial weight to Wilson's lack of prior adult convictions.

II. Appropriateness of Sentence

An appellate court's review under Indiana Appellate Rule 7(B) is extremely deferential to the trial court. *Pennington*, 821 N.E.2d at 903. We will not revise a sentence that is authorized by statute unless it is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B); *Hart v. State*, 829 N.E.2d 541, 543 (Ind. Ct. App. 2005). The nature of the offense refers to the statutory presumptive sentence for the class of crimes to which the offense belongs. *Pennington*, 821 N.E.2d at 903. The character of the offender refers to the general sentencing considerations under IC 35-38-1-7.1, the balancing of the aggravating and mitigating factors, and other factors within the trial court's discretion. *Id.*

Wilson contends that his lack of prior adult criminal history shows that he is not the worst offender. Wilson further argues that this circumstance should significantly mitigate any enhanced sentence.

A single valid aggravating circumstance is sufficient to enhance a presumptive sentence. *Martin v. State*, 784 N.E.2d 997, 1012 (Ind. Ct. App. 2003). Each of the aggravators, which the jury found, as well as aggravator seven, which the trial court found, was a valid aggravator relating to the nature of the offense. Additionally, Wilson's consumption of marijuana and alcohol, possession of a handgun without a license, reckless handling of a handgun, and failure to rehabilitate through juvenile court sanctions are all valid aggravators relating to his character. Moreover, Wilson created a danger to others, including a child, attempted to influence witnesses, inflicted additional injuries on Janowski after the initial shooting, and fled the jurisdiction when he learned that the police suspected him.

Wilson's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

III. Jury Request to Review Testimony

Wilson contends that the trial court erred in its response to the jury foreman's request to obtain copies of all transcripts presented to the jury. IC 34-36-1-6 governs the procedure for responding to jury questions. It provides that if, after the jury retires for deliberation there is a disagreement among the jurors as to any part of the testimony or the jury desires to be informed as to any point of law arising in the case, the trial court must give the information required in the presence of, or after notice to, the parties or the attorneys representing the parties.

Our Supreme Court has held that this statutory mandate applies only in those cases in which the jury explicitly indicates a disagreement. *Bouye v. State*, 699 N.E.2d 620,

627-28 (Ind. 1998). Conversely, when the jury fails to explicitly indicate a disagreement, the trial court may exercise discretion in determining whether to answer the jury's question. *Gantt v. State*, 825 N.E.2d 874, 876 (Ind. Ct. App. 2005) (citing *Wray v. State*, 720 N.E.2d 1185, 1190 (Ind. Ct. App. 1999), *trans. denied* (2000)).

Here, the jury expressed no explicit disagreement. When the jury requested all transcripts of testimony, the court asked the foreman three separate times whether there was a disagreement among the jury concerning testimony. The court also explained the statute to the jury foreman. The foreman never explicitly indicated a disagreement, and after hearing the court's explanation, answered "no" to the final question. *Appellant's App.* at 132. When the jury resumed deliberating, Wilson's counsel told the court that one juror had mouthed the word "yes" to the court's first question about a possible disagreement. Because the court was addressing the jury foreman and did not see the alleged non-verbal behavior, no record of the juror's facial expression exists for appellate review. Thus, we cannot find error in the trial court's refusal to grant the jury's request.

Affirmed.

BAILEY, J., and CRONE, J., concur.